



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

HARPAGON MO, LLC,)	
)	WD72834
Appellant,)	
v.)	OPINION FILED:
)	
EDWARD L. BOSCH AND NANCY Z.)	August 30, 2011
BOSCH, ET AL.,)	
)	
Respondents.)	

**Appeal from the Circuit Court of Clay County, Missouri
Honorable Larry Dale Harman, Judge**

Before: Thomas H. Newton, P.J., Cynthia L. Martin, and Gary D. Witt, JJ.

Harpagon MO, LLC (Harpagon) appeals the trial court's summary judgment in favor of Mr. Edward and Mrs. Nancy Bosch (the Bosches). We reverse and remand.

Factual and Procedural Background

Harpagon's predecessor Sunrise Atlantic, LLC (Sunrise) purchased the Bosches' property at a delinquent tax land sale held by the county collector. Sunrise received a certificate of purchase on August 27, 2007, and later sent separate notices of the right to redeem to the Bosches via certified mail on July 25, 2008. Mr. Bosch signed both return receipts for the notices. On October 31, 2008, Harpagon as successor to Sunrise presented the certificate of purchase to the county collector. On November 3, 2008,

Harpagon received a collector's deed to the Bosches' property. Thereafter, Harpagon filed an action against the Bosches to quiet title of the property in its favor. The Bosches answered, alleging affirmative defenses and claiming Harpagon lost its interest when it failed to comply with the statutory notice prerequisites.

Harpagon filed a motion for summary judgment on the ground that it complied with all prerequisites, and the Bosches filed a motion for summary judgment on the ground that notice was untimely and insufficient. Copies of the certificate of purchase, notices, return receipts, and the collector's deed were attached to the motions. A hearing was held, during which both sides argued their motions. The trial court entered summary judgment in the Bosches' favor and denied Harpagon's motion. Harpagon filed a motion to reconsider, but the trial court did not issue a ruling. Harpagon appeals.

Standard of Review

We review a grant of a summary judgment *de novo*. See *Harpagon Mo, LLC v. Clay Cnty. Collector*, 335 S.W.3d 99, 102 (Mo. App. W.D. 2011). In our review, we use the same criteria as the trial court in determining the propriety of the summary judgment. *Id.* "Summary judgment is only proper if the [movant] establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law." *Id.* We view facts in the light most favorable to the non-movant. *Transatlantic Ltd. v. Salva*, 71 S.W.3d 670, 675 (Mo. App. W.D. 2002).

Legal Analysis

In Harpagon's first point, it argues that the trial court erred in granting the Bosches' summary judgment because Harpagon's notice of redemption to the Bosches

was timely and sufficient and the Bosches failed to redeem. In Harpagon's second point, Harpagon argues that because it sent sufficient, timely notice and the Bosches failed to redeem, the trial court erred in denying its motion for summary judgment.

As defendants, the Bosches had to demonstrate one of the following circumstances to prevail on their motion for summary judgment:

(1) facts negating any one of the elements of the plaintiff's case; (2) that the plaintiff, after an adequate period for discovery, has not been able and will not be able to produce sufficient evidence to allow the trier of facts to find the existence of any one of the elements of the plaintiff's case; or (3) that there is no genuine dispute as to the existence of the facts necessary to support a properly pleaded affirmative defense.

Harpagon, 335 S.W.3d at 102.

The Bosches' motion for summary judgment stated that they were entitled to judgment as a matter of law because Harpagon failed to comply with the notice requirements of section 140.405 and thus lost all interest in the property. As a matter of law, a collector's deed becomes invalid if the purchaser fails to comply with the notice requirements of section 140.405. *Harpagon*, 335 S.W.3d at 103 (citing *Crossland v. Thompson*, 317 S.W.3d 635, 642 (Mo. App. S.D. 2010)). Thus, Harpagon had to demonstrate that the notice complied with section 140.405 to defeat the motion.

Section 140.405¹ states that the purchaser in a delinquent tax land sale must notify the record owners or any person with a publicly recorded interest in the property of their right to redeem at least ninety days before the date "a purchaser is authorized to acquire

¹ Statutory references are to RSMo 2000 and the Cumulative Supplement 2009. 2010 amendments to the statutes do not apply because these events occurred in 2008. See *United Asset Mgmt. Trust. Co. v. Clark*, 332 S.W.3d 159, 163 n.2 (Mo. App. W.D. 2010).

the deed.” Compliance with notice under section 140.405 thus requires the purchaser to send timely, adequate notice of the owner’s right to redeem.

Notice was timely.

The Bosches argued in their suggestions in support of their motion for summary judgment that Harpagon’s collector’s deed was invalid because the notice of redemption was not sent within ninety days before the expiration of the one-year redemption period but rather only thirty-three days prior. The Bosches relied on *CedarBridge, LLC v. Eason*, 293 S.W.3d 462, 465 (Mo. App. E.D. 2009), which states, “The purchaser must send the notice at least ninety days before it is authorized to acquire the deed to the property, i.e. at least ninety days before the expiration of the one-year redemption period.” Harpagon did not dispute the application of this case until its motion to reconsider, in which it argued for the application of *Boston v. Williamson*, 807 S.W.2d 216, 217 (Mo. App. W.D. 1991).

In *Boston*, we held that the proper time to give notice under section 140.405 was at least ninety days prior to the date the purchaser was authorized to acquire the deed. *Id.* at 218. We stated that section 140.405 did not provide a fixed time for when a purchaser was authorized to acquire a deed but only a timeframe based on related sections within chapter 140. *Id.* (construing section 140.405 in *pari materia* with sections 140.420, 140.340, and 140.410). That timeframe was described as after the redemption period expired, but before the viability period of the purchase certificate ended under section 140.410. *Id.* We concluded that Mr. Boston’s notice was timely, although sent more than

a year after he had purchased the property, because it was sent after the redemption period had expired but before the viability period ended. *Id.*

Despite recent notes by the Southern District and this district, *Boston* remains the controlling law on this issue of timely notice under section 140.405. *See United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 172 n.10 (Mo. App. W.D. 2010) (citing *Drake Dev. & Constr., LLC v. Jacob Holdings, Inc.*, 306 S.W.3d 171, 174 n.2 (Mo. App. S.D. 2010) (noting the language in *CedarBridge* conflicts with *Boston*'s holding)). The *CedarBridge* court's language interpreting section 140.405 as to requiring notice to be sent at least ninety days before the expiration of the one-year redemption period did not dispose of the points challenging the trial court's findings on notice, *CedarBridge*, 293 S.W.3d at 466-67, and thus is *dictum*. *See Richardson v. QuickTrip Corp.*, 81 S.W.3d 54, 59 (Mo. App. W.D. 2002) (*Obiter dictum* is language of the court that is not essential to the disposition of the case). *Dictum* is nonbinding precedent. *See id.* Thus, there is no conflict between the districts on this issue.

We are cognizant that the statutes addressed in *Boston* have since been amended. However, the amendments relevant to this issue only reduced the redemption period from two years to one year and the viability of the certificate of purchase from four to two years. 2003 Mo. Laws 969, 970. The reasoning from *Boston* still applied to the statutes existing in 2008. Therefore, notice of the right to redeem under section 140.405 is timely if sent at least ninety days before the one-year redemption period expires, or anytime after the redemption period, if sent at least ninety days before the date a purchaser applies

for a collector's deed as long as it is within the viability period of the certificate of purchase.

Here, the Bosches received their notices of redemption on July 28, 2008, and Harpagon delivered its certificate of purchase to the county collector on October 31, 2008, which was "at least ninety days" after notice. Consequently, the notice was timely, precluding the Bosches from prevailing on their motion for summary judgment on this ground. We now turn to the Bosches' second ground upon which they sought summary judgment—the sufficiency of the notice.

Notice was sufficient.

The Bosches also argued that the collector's deed was invalid because the notice of redemption did not state that the Bosches had one-year to redeem from the sale date, but rather informed them they had only ninety days to redeem. The Eastern and Southern Districts have interpreted section 140.405 to require that valid notice of the right to redeem must indicate how to redeem and the appropriate redemption period. *See, e.g., Drake*, 306 S.W.3d at 174 (Mo. App. S.D. 2010); *Keylien Corp. v. Johnson*, 284 S.W.3d 606, 613 (Mo. App. E.D. 2009).

We decline to follow those cases requiring the notice to mention a one-year redemption period from the sale date because that statement does not accurately reflect the owner's redemption period. *See Clark*, 332 S.W.3d at 164, 171 n.9. Our Missouri Supreme Court has held that the redemption period does not expire until a purchaser presents the certificate of purchase to the collector. *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. 1942). As stated in *Boston*, the purchaser elects the date on which it will

present its certificate of purchase, within a certain timeframe. 807 S.W.2d at 218. Sometimes the purchaser will elect a date days, weeks, or even months after the one-year redemption period has expired. Because the party with interest must receive notice of their right to redeem at least ninety days before the purchaser may obtain a collector's deed, the redemption period is thereby extended. *See Clark*, 332 S.W.3d at 164. If the purchaser does not apply for the collector's deed after the ninety days expire, the interested party may still redeem under *Hobson*. *Id.* Thus, stating a one-year redemption period in a notice of redemption may serve to mislead owners in some circumstances.

Here, Harpagon's notices to Mr. Bosch and Mrs. Bosch stated that the notice of the right to redeem was sent in accordance with section 140.405 and informed each that they had ninety days to redeem the property, or else their ownership interest would be forever foreclosed and barred from redemption. The Bosches argue that the notices were defective because they did not indicate when the ninety days commenced. We disagree; the notices were not misleading. Armed with the proper statute, the Bosches could have learned the specifics about their right to redeem. *See Clark*, 332 S.W.3d at 175. Consequently, notice was sufficient. Thus, the Bosches' summary judgment should not have been granted.² Harpagon's first point is granted.

In its second point, Harpagon argues that its motion for summary judgment should have been granted because the Bosches failed to redeem the property after adequate notice. First, generally we do not review denials of summary judgment. *See*

² The Bosches also argue that the notice was insufficient because the description of the property was flawed. This contention was not raised in the lower court, so we do not address it.

Transatlantic Ltd., 71 S.W.3d at 675. However, we have done so when the merits of the denial are “completely intertwined with a grant of summary judgment in favor of an opposing party.” *Id.* at 675-76. Under Rule 84.14, we may enter the judgment the trial court should have made. *See id.* at 676.

In their response to Harpagon’s motion for summary judgment, the Bosches requested more time to explore the other affirmative defenses raised against Harpagon. Harpagon’s motion did not address these other defenses, so the trial did not err in denying Harpagon’s motion. *See id.* Thus, we are precluded from entering judgment because further proceedings are necessary. *See DeBaliviere Place Ass’n v. Veal*, 337 S.W.3d 670, 679 (Mo. banc 2011). Harpagon’s second point is denied.

Conclusion

Therefore, we reverse and remand for further proceedings consistent with this opinion.

Thomas H. Newton, Presiding Judge

Martin and Witt, JJ. concur.